Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection of Regulatory Fees for Fiscal Year 1995	)	MD Docket No. 95-3

COMMENTS OF AMERICA'S CARRIERS TELECOMMUNICATIONS ASSOCIATION

The America's Carriers Telecommunications Association (hereafter "ACTA"), by its attorney, hereby submits its comments in response to the FCC's Notice of Proposed Rulemaking, FCC 95-14 (hereafter "Notice"), in the above-captioned docket.

I. INTRODUCTION

ACTA is a trade association established in 1985 to represent the interests of independently owned and operated communications carriers providing small business and residential users with switched based and switchless resale long distance communications service. ACTA member companies will be significantly impacted by the proposals in the Notice concerning the assessment and payment of regulatory fees by common carriers.

As the Notice acknowledges, the FCC's "proposal and a proposed alternative method of calculating fees for the carrier category represent a significant modification of the method in which regulatory fees are calculated...." Notice, ¶58. Because of these significant changes, the Commission has requested comments on the most "equitable" method for assessment of the carrier fees. Id. For the following reasons, ACTA submits that the proposals in the Notice, which seek to modify the fee schedule in Section 9(g) of

the Communications Act to extend the regulatory fee requirement to resellers that were not previously obligated to pay such fees, are not equitable at all, much less the "most equitable" method, given the present state of regulation of the resale carrier industry.

II. THE PROPOSED COMMON CARRIER REGULATORY FEES WILL HAVE AN INEQUITABLE AND DISPROPORTIONATE IMPACT ON RESALE CARRIERS

The Commission apparently intends to impose regulatory fees on resale carriers in the same amount, and in the same manner, as the fees are assessed on facilities-based carriers. Notice, ¶57. Presumably this action is being taken pursuant to the provisions of Section 9(b)(3) of the Act, which allow for "permitted amendments" to the schedule of regulatory fees. However, such amendments only are to be made in a manner that reflects "the benefits of regulation to the payors of the fees", considering, inter alia, the nature of their service and other public interest factors.

No attempt has been made in the Notice to meet this threshold showing with respect to the payment of regulatory fees by resale carriers. The Notice only states baldly that resellers provide interstate services subject to FCC jurisdiction and therefore benefit "from our regulation of the interstate network...." There is no showing whatsoever as to the extent of that regulation vis-a-vis facilities based carriers, no showing as to the nature of the service provided by resellers vis-a-vis facilities based carriers, no showing as to exactly how resale carriers have benefitted from FCC regulation, and no showing of any "other public interest factors." Moreover, there is no showing as to how either the nature of the FCC's regulation of resale carriers, or the benefits

derived by resale carriers from that regulation, has changed since the initial adoption by Congress of Section 9 of the Act or the FCC's Order on Fiscal year 1994 regulatory fees. It is simply on the basis of one sentence in the Notice that the FCC now proposes to impose the same fee system, and the same dollar amounts, on resale carriers as will be imposed on facilities based carriers. ACTA submits that that one sentence does not amount to a sufficient showing that the FCC has considered the "most equitable method" of assessing common carrier fees.

Noticeably lacking in the Notice is a discussion of the impact on resale carriers of a regulatory fee of the magnitude calculated in the Notice. Not only is the fee for Fiscal Year 1995 apparently going to be double that for Fiscal Year 1994 ($0.13 per customer unit vs. $0.06 per customer unit), but it is being imposed on carriers that did not pay any fees for Fiscal Year 1994. The resulting rate "shock" on all carriers, including facilities-based carriers, will be considerable. However, resale carriers will be faced with a financial burden not previously experienced at all in Fiscal Year 1994, and the Commission should recognize that it will be difficult for many smaller carriers to absorb this new burden as a simple cost of doing business.

Moreover, it is important that the Commission recognize the dynamics of the resale marketplace in assessing carrier fees. For resale carriers, a considerable portion of the revenue received from each customer line is remitted to the resale carrier's underlying facilities- based carrier to pay for the cost of using

the network. Thus, if the regulatory fee payments are based on the "benefits" that carriers receive from the FCC's regulation of the interstate network, and if the FCC considers such "benefits" to be equated with revenues received by the carrier for the use of the network, the FCC's logic is flawed as applied to resale carriers. The "benefits" received by resale carriers (in terms of revenue per line) cannot be equated with those received by facilities-based carriers, because resale carriers contribute a portion of that "benefit" back to the facilities-based carrier. Yet resale carriers will be making the same contribution to the costs of regulating that network as facilities-based carriers. The proposed funding scheme makes no attempt to minimize this inequitable impact on resale carriers.

Additionally, it is far from clear from a reading of the Notice precisely how the fee will be applied to those carriers that provide service by reselling the tariffed services of facilities-based carriers. For example, the Notice states that the Commission "proposes to calculate carrier fees based on the number of customer units, i.e., the number of users of a service, provided by a carrier as of December 31, 1994." Notice, ¶59. For MTS provided by pre-selected interexchange carriers, the number of customer units will equal "the number of presubscribed lines as described in Section 69.116 of the Commission's Rules." Id. But Section 69.116, by its terms, is only applicable to "interexchange carriers that use local exchange switching facilities for the provision of interstate and foreign telecommunications services and that have at

least .05 percent of the total common lines presubscribed to interexchange carriers in all study areas." (emphasis added). How then will the charge be assessed on those carriers that have less than .05 percent of the presubscribed common lines? And how will information on each carrier's presubscribed line count be accumulated for those carriers that do not pay Universal Service Fund assessments pursuant to Section 69.116 because they have less than .05% of the total presubscribed common lines? ACTA respectfully requests that if this fee structure is finally adopted, that the FCC clarify how the payments will be assessed on all resale carriers.

III. THE PROPOSED FUNDING MECHANISM WILL RESULT IN DOUBLE-COUNTING OF CARRIER REGULATORY FEES

The FCC is aware that many resale carriers do not have their own CIC codes, but rather operate under the CIC code of their underlying facilities-based carriers. Thus, a payment mechanism based on the number of lines presubscribed to each carrier will result in a "double-counting" of the fee imposed on resellers. The facilities-based carrier will pay a fee based on a line count that includes lines that are used by resale carriers, and the resale carrier will pay a fee on the same lines for which the fee also is being paid by the facilities based carrier. And if the facilities-based carrier passes through the fee to resale carriers using its lines, on a per-line basis, the resale carrier in effect will pay a double fee. Surely a payment scheme that results in smaller carriers paying double for the so-called "benefits" of the use of

the interstate network is not the "most efficient and equitable method for assessment of regulatory fees."

Congress has recently recognized the dangers of "double-counting" as applied to resale carriers in the context of common carrier funding mechanisms. In a report issued in October 1994 by the House Committee on Energy and Commerce to accompany the Federal Communications Commission Authorization Act of 1994, H.R. 4522, the Committee specifically stated that "[a]ny funding mechanism that imposes charges on both resellers and facilities-based providers should be rationalized so that it does not result in a "double-counting" of the fee imposed on resellers." House Report 103-844, 103rd Cong. 2d Sess., at 11. The Committee also stated that it wanted to "stress" that funding mechanisms must "recognize the reality of the communications marketplace" and not result in an "unfair 'double-counting' on some telecommunications providers". Id. (emphasis added).

This Report acknowledges that resellers and facilities-based providers both must "contribute equitably" to industry-wide funding mechanisms (Id.). ACTA agrees. However, Congress also is of the belief that any such mechanisms that result in double counting are not equitable or fair to either resale carriers or facilities-based carriers. It is unfortunate that the Commission is now considering adopting just such an unfair and unequitable funding mechanism, less than six months after this Committee Report was published.

IV. THE PROPOSED ALTERNATIVE FEE STRUCTURE IS PREFERABLE BUT STILL FLAWED

The Notice also proposes an alternative to the fee structure described above. Notice ¶ 60. Presumably each individual carrier is not free to choose which alternative funding scheme to utilize, but rather the Commission will choose, after comments are received on the Notice, which fee structure to adopt. The Notice, however, is far from clear on this point, and ACTA requests clarification in the final order on this point.

The alternative would base carrier fees on the number of minutes of interstate service in calendar year 1994. For interstate service upon which access charges are paid, the number of minutes would equal the number of originating and terminating access minutes. For other interstate services billed based on timed usage, the number of minutes would equal the number of billed minutes. The Notice calculates that this scheme results in a fee of $0.08 per 1000 minutes.

This fee structure suffers from the same "double-counting" as the FCC's other proposal. Minutes of use utilized by resale carriers will be reported by facilities based carriers as part of their total minutes of usage, and fees will be paid on those minutes. The same minutes of use will be reported by resale carriers and fees will again be paid based on those minutes.[1] And

[1]The Commission also appears to be double-counting in its calculation as to the total number of interstate minutes to be used to calculate the fee. The Notice counts approximately 393 billion common carrier line access minutes in 1994 and then adds 5% for resale, despite the fact that resale is presumably already included in the 393 billion access minutes that are reported.

once again, the Commission is not recognizing that for resale carriers, the revenue generated per minute of use is considerably less than for facilities-based carriers, because resale carriers remit a substantial portion of their revenues to their facilities-based carrier. The Commission also is not recognizing that facilities-based carriers may be passing through the regulatory fees on to their resale carrier customers, with the inequitable result that resale carriers are in effect paying double the fee for the use of the interstate network.

It does appear, however, that the alternative mechanism based on billed minutes has certain advantages for resale carriers in terms of administrative convenience. This approach does not depend on a count of customer lines that is performed by individual local exchange carriers and/or NECA, as does the first alternative. Carrier costs and man-hours to report and calculate the required regulatory fee therefore will be lessened if this approach is adopted.

V. Conclusion

For the reasons stated above, ACTA submits that the proposed regulatory fee system for interexchange carriers and resale carriers is inequitable, poorly explained, and ill-conceived. The double counting and administrative uncertainties cited above will have significant adverse impacts on the resale carrier industry, particularly smaller carriers. ACTA recognizes the Commission's statutory authority to impose regulatory fees. However, the Commission also must recognize its statutory obligation to avoid

inequitable results and the marketplace dislocations that inevitably will flow therefrom. Therefore, ACTA requests that the Commission adhere to the same payment scheme as utilized for Fiscal year 1994, and not extend the fee requirement to resellers that were not subject to payment in 1994. And if a determination is made that resellers must bear some of the costs of regulating the interstate network, clearly then the share of those costs borne by resellers should be proportional to their share of the "benefits" of regulation — and therefore must be less than that paid by facilities-based carriers. Moreover, a gradual phase-in of such obligation over a period of several years would avoid a severe and obviously inequitable financial burden on resale carriers and allow for continued growth of the industry.

Pursuant to ¶ 70 of the Order, ACTA is submitting comments on the Commission's Initial Regulatory Flexibility Analysis as Attachment A to these comments.

Respectfully submitted,

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ATTACHMENT A

RESPONSE TO INITIAL
REGULATORY FLEXIBILITY ANALYSIS

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RESPONSE OF AMERICA'S CARRIERS TELECOMMUNICATIONS ASSOCIATION ON INITIAL REGULATORY FLEXIBILITY ANALYSIS

The America's Carriers Telecommunications Association (hereafter "ACTA") hereby submits its Response to the Initial Regulatory Flexibility Analysis ("IRFA") performed by the FCC in connection with the above-captioned Notice of Proposed Rulemaking, FCC 95-14 (hereafter "Notice"). This Response is being filed pursuant to the instructions in ¶70 of the Notice.

ACTA certainly agrees with the stated objectives set forth in the IRFA, which is to insure that the necessary amount of regulatory fees is collected "in the most efficient manner possible and without undue burden to the public." ACTA also agrees with the recognition in the IRFA that the proposed Schedule of Regulatory Fees will have a significant impact on small entities. The IRFA states that after evaluating the comments filed in this proceeding, the Final Regulatory Flexibility Analysis will include findings on the impact on small entities. However, a preliminary analysis of this impact is not provided in the IRFA.

ACTA reiterates its position set forth in the attached Comments that the proposed funding mechanisms for the payment of regulatory fees by common carriers will have a severe impact on

resale carriers, many of whom are small entities. Not only will the amount of the per-line carrier fee more than double if the proposed fee structure is adopted (a fee of $0.13 per customer unit is being proposed, compared to the fee of $0.06 per unit adopted in the Fiscal Year 1994 Order), but the payment obligation will be extended to resale carriers not previously required to pay regulatory fees. A new cost of this magnitude will be a serious financial burden on smaller carriers, and the Commission is obligated to consider this burden in adopting final rules in this proceeding. The Commission also must address this burden in the Final Regulatory Flexibility Act analysis.

The Commission also is obligated to consider alternative methods of collecting carrier regulatory fees that will not unnecessarily burden smaller carriers. In this regard, ACTA's comments in this proceeding point out that the proposed fees will result in a "double-counting" as applied to resellers, because fees will be assessed on resellers directly, but facilities-based carriers also will be assessed fees based on the customer lines and/or minutes of service that are provided to resale carriers. This double-counting is inequitable both to resale carriers and facilities-based carriers. Moreover, if the amount of the regulatory fees that are paid by facilities-based carriers on the lines provided to resellers is then passed through by the facilities-based carrier to its reseller customers, the reseller is paying double the fee, which only increases the financial burden on the smaller resale carriers.

ACTA suggests that the Commission adopt a fee schedule that recognizes both the double counting and the burden caused thereby on smaller carriers. If a finding is made that resellers must contribute to the agency costs recovered through regulatory fees, the payment obligation should be phased in gradually over a period of years, in order to avoid untoward "rate shock" on smaller carrier entities. Moreover, the amount of the fee paid by resale carriers should be less than that paid by facilities based carriers, in recognition of the realities and dynamics of the resale carrier marketplace.